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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. [redacted] 104

HAMLET ICE COMPANY, INCORPORATED,
Petitioner,

vs.

PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

J. L. EMANUEL,
JAMES H. POU, JR.,
O. L. HENRY,
L. R. VARSER,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1268

HAMLET ICE COMPANY, INCORPORATED,
Petitioner,

vs.

PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorables, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Hamlet Ice Company, a corporation, respectfully submits this petition for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit in the above entitled case, decided April 13, 1942.

The Circuit Court of Appeals for the Fourth Circuit has affirmed on appeal a judgment of the District Court of the United States for the Eastern District of North Carolina, holding that the petitioner is within the terms of the Fair

Labor Standards Act of 1938, 52 Stat. 1060, paragraphs 6, 7 and 11 (c), and had violated the prohibitions of the Act which require conformity with these standards, paragraphs 15 (a) (1), 15 (a) (2), 15 (a) (5), 29 U. S. C. A., paragraphs 215 (a) (1), 215 (a) (2) and 215 (a) (5).

Statement of the Case.

This is an action instituted by Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, against the petitioner, in the United States District Court for the Eastern District of North Carolina, to enjoin the petitioner, Hamlet Ice Company, from violating the terms of the Fair Labor Standards Act in respect to the wages paid and the records kept by the petitioner.

The petitioner denied that it was within the terms of the Fair Labor Standards Act.

The cause was referred to a Master, who heard the testimony and reported his findings of fact and conclusions of law in favor of the petitioner, but upon exceptions filed, the District Court rendered its judgment in favor of the respondent, holding that the petitioner was within the terms of the Fair Labor Standards Act and had violated its prohibitions in respect to wages and the keeping of records.

Petitioner appealed to the Circuit Court of Appeals for the Fourth Circuit, which affirmed the judgment of the District Court on April 13, 1942. Opinion of the Court was by Soper, Circuit Judge, and Circuit Judge Parker and District Judge Waring agreed.

Question Presented.

1. IS THE PETITIONER ENGAGED IN INTERSTATE COMMERCE, OR THE PRODUCTION OF GOODS FOR INTERSTATE COMMERCE?

Reasons for Allowance of the Writ.

1. The question presented in this case is of national importance, in that it involves the question whether the Fair Labor Standards Act of 1938 includes an ice manufacturing business that ships nothing, but sells and delivers its products, at, or nearby, its own plant, to local individual consumers, at Hamlet, North Carolina, and to the Receivers of the Seaboard Air Line Railway, the Fruit Growers Express Company and the Railway Express Company. The question depends on the sales to the Receivers of the Seaboard Air Line Railway, the Fruit Growers Express Company and the Railway Express Company. These purchasers take defendant's ice and break it into suitable sizes and the Railway uses part of it for office use and in cars for drinking water purposes, and the Fruit Growers Express Company uses the ice to fill bunkers according to its service contract with the Railway. The Railway Express Company uses the ice to refrigerate less than carload lots.

2. The decision of the Circuit Court of Appeals is in conflict with other decisions interpreting the same, or similar, statutory language, and the District Courts are in direct conflict.

Winslow v. *Federal Trade Commission,* 4 Cir., 277 Fed. 206;

Federal Trade Commission v. *Bunte Bros.,* 312 U. S. 349;

Bunte Bros. v. *Federal Trade Commission,* 7 Cir., 104 F. (2d) 996.

Chapman v. *Home Ice Co.*, 5 Wage Hour Report 133, from the Western District of Tennessee, is in direct support of petitioner's contention, while *Gordon* v. *Paducah Ice Mfg. Co.*, 41 Fed. Supp. 980, 986, from the Western District of Kentucky, reaches a contrary conclusion to the Chapman case. The holding that the Ice Company, in the Gordon case, was under the Fair Labor Standards Act does not appear to have been necessary. *Fleming* v. *Atlantic Co.*, 40 Fed. Supp. 654, 662, may be said to be contrary to the Chapman case, but some ice did go into interstate commerce, and *Fleming* v. *Hitchcock*, 38 Fed. Supp. 358, was based on a sale and distribution of car strips, and other materials, used in loading citrus fruits for interstate shipment.

3. The decision of the Circuit Court of Appeals gives to the Fair Labor Standards Act the same effect as if the Act contained the House Amendment, which provided for minimum wages and maximum hours in any industry affecting commerce, although this amendment was eliminated. See Conference Report No. 2738, June 11, 1938, C. C. H. Labor Law Service, paragraphs 4121 and 4123.

The decision also is contrary to *Jewel Tea Company* v. *Williams*, 118 F. (2) 202, 206.

4. The question decided by the Circuit Court of Appeals is most important to the public and to the manufacturers of ice, and similar commodities, as well as employees engaged in this and similar industries which have similar business practices, to the end that they should know the extent, as well as the limitation of the Fair Labor Standards Act as applied to intrastate transactions and where, in such transactions, intrastate commerce ends and interstate commerce under the Fair Labor Standards Act begins.

5. For that the Circuit Court of Appeals denied, in its interpretation of the Fair Labor Standards Act, to peti-

tioner the benefit of the exemption provided in Section 3, of the Fair Labor Standards Act defining "goods" when it says, "but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof, other than a producer, manufacturer or processor." The effect and function of this definition of "goods" is of extreme importance in industry when the application of the Fair Labor Standards Act is in question, and your petitioner contends that all of its purchasers are ultimate consumers and are "other than a producer, manufacturer or processor thereof".

WHEREFORE your petitioner respectfully prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Fourth Circuit, commanding said Court to certify and to send to this Court a full and complete transcript of the record and of the proceedings in said Circuit Court of Appeals had in said matter, to the end that this cause may be reviewed and determined by this Honorable Court, as provided by the statutes of the United States and the rules of this Court, and that the judgment herein of the said Circuit Court of Appeals be reversed by this Honorable Court, and for such other and further relief as to the Court may seem proper.

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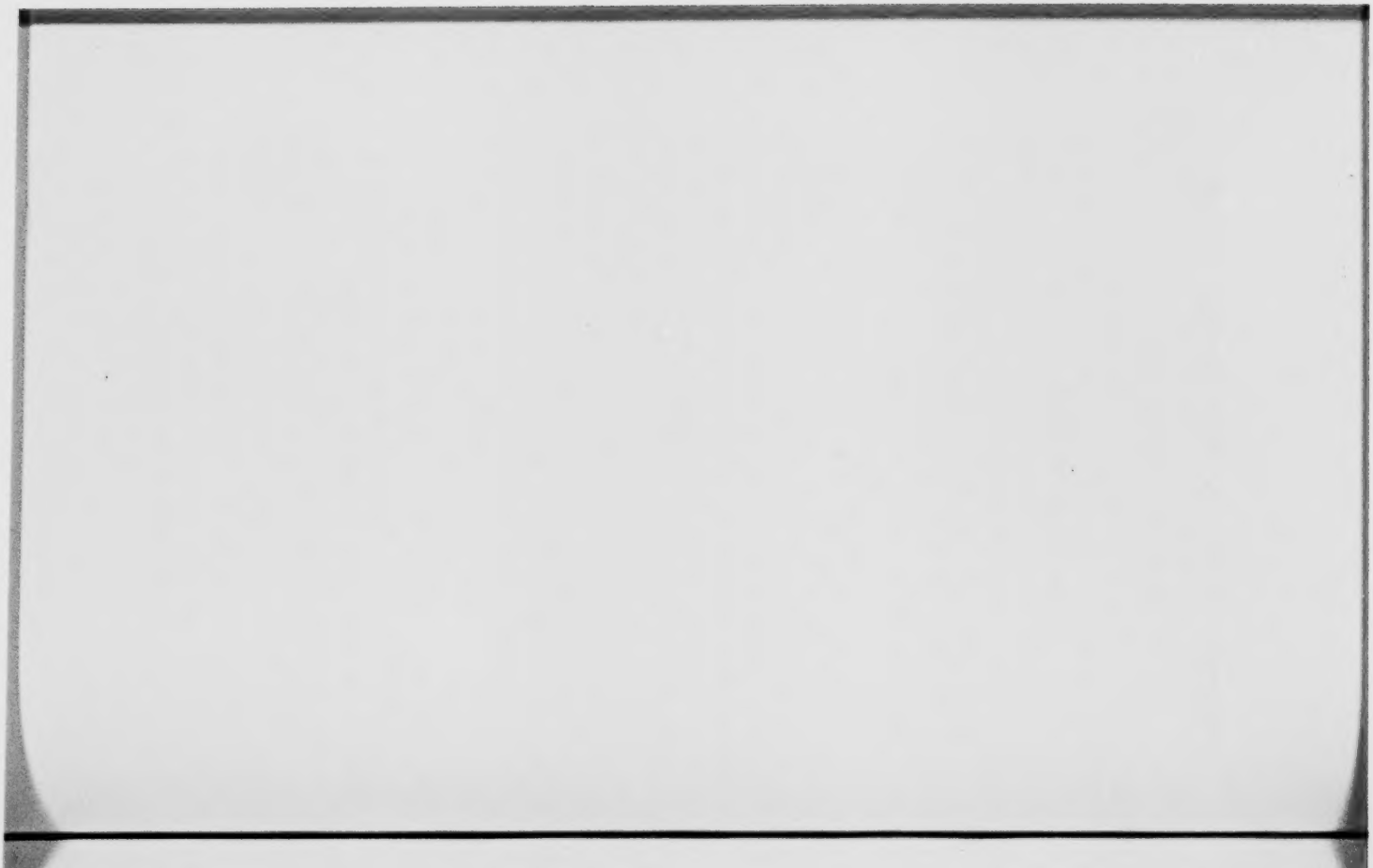

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1268

HAMLET ICE COMPANY, INCORPORATED,
Petitioner,

vs.

PHILIP B. FLEMING, Administrator of the Wage and Hour Division, United States Department of Labor.

SUPPORTING BRIEF ON PETITION FOR WRIT OF CERTIORARI.

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1. The plaintiff prays for a writ of certiorari to review decision affirming decision of the Circuit Court of Appeals for the Fourth Circuit, which affirmed a judgment of the District Court for the Eastern District of North Carolina. The opinion of the Circuit Court of Appeals was decided April 13, 1942, not yet officially reported.

2. Jurisdiction of the Supreme Court of the United States is based on, and supported by, the following:

Judicial Code, Section 240, as amended 28 U. S. C. A., Section 347

The statute sought to be reviewed is the Fair Labor Standards Act 1938, 52 Stat. 1060, paragraphs 6, 7 and 11 (c), 29 U. S. C. A., paragraphs 206, 207 and 211 (c).

3. The judgment of the District Court was entered on the 9th day of September, 1941, and the opinion and judgment of the Circuit Court of Appeals upon consideration thereof was decided April 13, 1942.

4. The nature of the case arises out of the claim on the part of the Administrator of the Wage and Hour Division of the Fair Labor Standards Act of 1938 that the Hamlet Ice Company, petitioner, is subject to the provisions of this Act. The Ice Company denied that it was engaged in interstate commerce or the production of goods for interstate commerce and that, in any event the provision in the Fair Labor Standards Act of 1938, in Section 3 (i), provides, " 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof."

And the petitioner, defendant in the court below, contended that, since "goods" constitute a necessary part of commerce, and that under this Act the life of "goods" ended when they were delivered into the physical possession of the ultimate consumer thereof, which ultimate consumer was not a producer, a manufacturer or processor.

The determination of the limitation of interstate commerce, as well as the production of goods for interstate commerce under the terms of the Fair Labor Standards Act is involved. The District Court, which reversed the Master's holding, and the Circuit Court of Appeals for the Fourth Circuit held that the defendant petitioner was within the limits of the Fair Labor Standards Act of 1938.

The petitioner defendant denied these contentions and claimed that its activities were not in interstate commerce

and did not produce goods for interstate commerce as defined in the Fair Labor Standards Act.

5. Cases sustaining the unlimited jurisdiction of the Supreme Court of the United States to review cases determined in the Circuit Court of Appeals:

Warner v. *New Orleans*, 176 U. S. 474;
Title Guaranty & Surety Co. v. *U. S.*, 222 U. S. 401;
Ex Parte Chetwood, 165 U. S. 443;
United States v. *Gulf Refining Co.*, 268 U. S., 452.

6. Specification of Error Assigned:

(1) Is the petitioner (defendant below) engaged in interstate commerce or the production of goods for interstate commerce?

The error assigned is that the District Court and the Circuit Court of Appeals erroneously held that the defendant is engaged in interstate commerce and in the production of goods for interstate commerce.

7. Statement of Case.

The defendant manufactures ice, at Hamlet, North Carolina, and the sales relied on by the Administrator are made to Receivers of Seaboard Air Line Railway Company, Railway Express Company and Fruit Growers Express Company. Delivery of ice in 300-pound blocks is made at, and near to, defendant's plant. The Fruit Growers Express Company ice its cars and furnish refrigeration service to the Railway. The Railway Express Company uses its ice to refrigerate less than car-load lot shipments. The Railway Company uses ice in Pullman cars for drinking water purposes in cars and in its offices at Hamlet. The ice is consumed in the refrigeration service. Defendant petitioner says, upon this, that it is excluded from the provisions of the Fair Labor Standards Act of 1938 in that it

does not engage in interstate commerce and its goods are not produced for interstate commerce, but that its three customers are ultimate consumers thereof (R. 87-89, 91-95).

Argument.

Petitioner contends that it is not within the terms of the Fair Labor Standards Act, because its goods never go into commerce between the States and that no other person ships its goods in interstate commerce and that they are used and consumed in the use by the purchasers, for that the Fair Labor Standards Act, Section 3 (i), cuts off the flow of defendant's goods when they are delivered to the three named ultimate consumers. The House amendment, including "in any industry affecting commerce," was eliminated during the legislative birth of the Fair Labor Standards Act of 1938. The following authorities are relied on:

California Rice Industry v. *Federal Trade Commission,* 102 F. (2d) 716;

Carter v. *Carter Coal Co.,* 298 U. S. 238, 299, 317, 80 L. Ed. 1160;

Bunte Bros., Inc., v. *Federal Trade Commission,* 110 F. (2d) 412;

15 C. J. 2nd, page 298, paragraph 28;

Winslow, et al., v. *Federal Trade Commission,* 277 Fed. 206;

Hooper v. *California,* 155 U. S. 655, 39 L. Ed. 297;

Federal Trade Commission v. *Bunte Bros.,* 312 U. S. 349;

Jewel Tea Co. v. *Williams,* 118 F. (2d) 202, 206;

Puget Sound Stevedoring Co. v. *State Tax Commission,* 302 U. S. 90;

Williams v. *Feats,* 179 U. S. 270, 278;

Federal Compress Co. v. *McLean,* 291 U. S. 17, 21, 22;

Chassaniol v. *Greenwood,* 291 U. S. 584;

Eastern Air Transport, Inc., v. *South Carolina Tax Commission*, 285 U. S. 147;
Superior Oil Company v. *Miss.*, 280 U. S. 390;
U. S. v. *Southerland*, 9 Fed. Supp. 204;
Sou. Ry. Co. v. *Pitchford*, 253 Fed. 736;
Chicago, Etc., Co. v. *Harrington*, 241 U. S. 177;
Hopkins v. *United States*, 171 U. S. 578;
Schecter Bros. v. *U. S.*, 295 U. S. 495;
General Oil Co. v. *Crain*, 209 U. S. 211, 229;
Chicago, R. I. & P. R. Co. v. *Petroleum Ref. Co.*, 39 F. (2) 629.

The petitioner recognizes the granting of writs of certiorari is within the judicial discretion of this Court, but contends that the question is of sufficient importance and that there is no doubt as to the jurisdiction to grant the writ.

Respectfully submitted,

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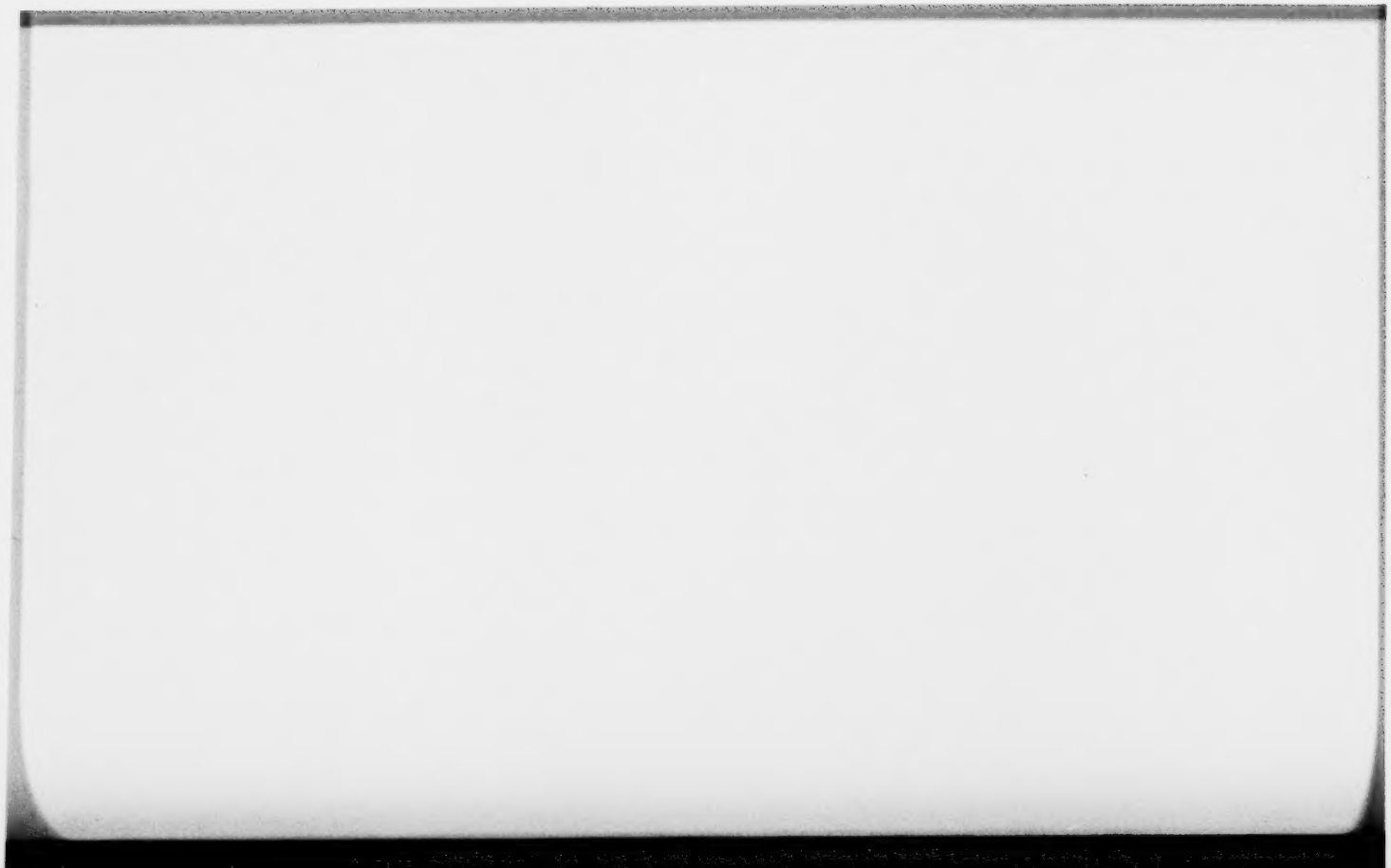

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 104

HAMLET ICE COMPANY, INCORPORATED, PETITIONER

v.

PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. 1–30) are not officially reported. The opinion of the Circuit Court of Appeals (R. 171–180) is reported in 127 F. (2d) 165.

JURISDICTION

The judgment of the Circuit Court of Appeals (R. 180–181) was entered on April 13, 1942. The petition for a writ of certiorari was filed on May

29, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

Whether petitioner's employees, engaged in the production of ice which is sold within the State to interstate rail carriers for use as a refrigerant of foods moving in interstate commerce, are engaged in "the production of goods for commerce" within the meaning of Sections 6 and 7 of the Fair Labor Standards Act.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act are set out in the Appendix.

STATEMENT

On August 29, 1940, the Administrator filed in the District Court a complaint against petitioner alleging that petitioner was violating Sections 15 (a) (1), 15 (a) (2), and 15 (a) (5) of the Fair Labor Standards Act and requesting an injunction against such violations. The complaint alleged that petitioner's employees were engaged in interstate commerce and in the production of goods for commerce within the meaning of Sections 6 and 7 of that Act but that petitioner had not complied with those provisions. In its answer, petitioner admitted noncompliance but asserted that the Act was not applicable to its employees. The District

Court found that petitioner was subject to the Act and issued the injunction prayed for (R. 1–35). The Circuit Court of Appeals affirmed (R. 171–181). The findings of the District Court, which are supported by the evidence and are not challenged by petitioner, may be summarized as follows:

Petitioner's employees are engaged within the State of North Carolina in the manufacture of ice, some 75 percent of which petitioner sells and delivers within the State to Fruit Growers Express Company, Seaboard Air Line Railway Company, and the Railway Express Agency, all interstate carriers by rail (R. 5–6, 13–16).[1] The ice is used by Fruit Growers to ice refrigerator cars carrying fruits and vegetables; most of the ice delivered to Seaboard is used to ice coaches, Pullman cars, dining cars, and railway post office cars on passenger trains and to ice foods and beverages in dining cars and drinking water in other cars, and by Railway Express to ice less-than-carload shipments of fish and shell food (R. 17, 19–20, 21). Practically all the cars thus iced with petitioner's product are on interstate journeys (R. 17, 20–21).

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[1] During the period from October 24, 1938, to October 24, 1940, petitioner sold 41.5 percent of the ice produced to Fruit Growers Express, 25.38 percent to Seaboard Air Line Railway, and 8.4 percent to the Railway Express Agency (R. 13–14). The remainder, about 25 percent of petitioner's output, is sold from its substation in Hamlet to purchasers who consume it within the State (R. 3). The employees at the substation are not covered by the injunction (R. 28, 32).

The actual icing of the cars is performed by employees of the carriers, who break up 300-pound blocks received from petitioner into sizes suitable for placing in the bunkers of the refrigerator cars and in the coolers and ice boxes of the passenger and other cars (R. 17–21). At the time the ice is manufactured, petitioner knows and intends that the ice will be sent out of the State by the purchasers (R. 21–22; see R. 145–146, 148–149, 151–156, 157–163, 164–168).

ARGUMENT

Petitioner contends (pet. 9–10) that it is not engaged in interstate commerce, that its goods are not produced for commerce, and that it is excluded from the Act by the definition of "goods" in Section 3 (i). Since the ice petitioner produces is shipped and used on interstate trains, petitioner plainly is engaged in the "production of goods for commerce," and it is immaterial whether petitioner itself is engaged in interstate commerce. *Kirschbaum* v. *Walling,* No. 910, last Term; *Enterprise Box Co.* v. *Walling,* 125 F. (2d) 897 (C. C. A. 5), certiorari denied, June 8, 1942, No. 1275, last Term.

Section 3 (i) excludes from the term "goods" products "*after* their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer or processor thereof." [Italics supplied.] Since petitioner produces goods *before* their delivery to the ultimate consumer, it does not come within this provision.

As the language of the clause indicates and as the court below held (R. 179–180), the purpose of the provision was not to make the Act inapplicable to producers, but to protect the ultimate consumer who carries goods across state lines as his personal property from the prohibitions of Section 15 (a) (1). Manifestly, even if the carriers be regarded as ultimate consumers, the fact that the ice might not be goods while in their possession does not relate back to destroy its character as "goods" at the time of production. The identical contention was rejected in the *Enterprise Box* case, *supra,* in which this Court denied certiorari. In accord also are *Gordon* v. *Paducah Ice Manufacturing Co.,* 41 F. Supp. 980, 986 (W. D. Ky.); *Fleming* v. *Atlantic Co.,* 40 F. Supp. 654, 662 (N. D. Ga.), pending on appeal to the Fifth Circuit; see *Fleming* v. *Hitchcock,* 38 F. Supp. 358 (S. D. Fla.). *Contra: Chapman* v. *Home Ice Co.,* 43 F. Supp. 424, 430 (W. D. Tenn.), pending on appeal to the Sixth Circuit. With the exception of the *Chapman* case, which is contrary to the weight of authority, none of the cases cited by petitioner has any bearing upon the question presented.

CONCLUSION

There is no conflict of decisions among the Circuit Courts of Appeals, and the decision below is plainly

correct. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1942.

APPENDIX

Fair Labor Standards Act (Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201):

SEC. 3. (b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

* * * * *

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

* * * * *

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

* * * * *

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce.

* * * * *

SEC. 15. (a) After the expiration of one hundred and twenty days from the enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation.

U. S. GOVERNMENT PRINTING OFFICE: 1942